

MAY 7 1976

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. 75-1371

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF
AMERICA, *Petitioner,*

v.

GREAT COASTAL EXPRESS, INC., *Respondent.*

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

REPLY MEMORANDUM FOR PETITIONER

SIDNEY DICKSTEIN
GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D. C. 20037
Attorneys for Petitioner



IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. 75-1371

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF
AMERICA, *Petitioner*,
v.
GREAT COASTAL EXPRESS, INC., *Respondent*.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

REPLY MEMORANDUM FOR PETITIONER

A. THE QUESTIONS PRESENTED ARE PROPERLY HERE.

Respondent first asserts that the petition "creates only a fictitious 'question' for consideration here" (Opp. 1);¹ since Questions 1 (a) and (b) and Ques-

¹ Throughout this reply "Pet." will refer to the petition for certiorari; "App." will refer to the appendix to the petition for certiorari; and "Opp." will refer to Great Coastal's Brief in Opposition. In referring to the record in the court below, we will use the same designation as in the Petition (Pet. 3, n.*), except, of course, when quoting Respondent.

tion 2 are drawn directly from the Court of Appeals' rulings, see Pet. 12 (describing the opinion below) and our explicit discussion of that opinion throughout our argument, the questions presented are very much in this case, and cannot be wished away.² On the other hand, the opinion of the Court of Appeals will be searched in vain for a discussion of the well-established principles of the law"³ or the "uncontested set of facts"⁴

² Respondent also says that "[t]he argument which is now made to this Court in the Union's Petition was added in that appeal, but was little more than 'makeweight.'" (Opp. 15, n. 1. While it is jurisdictionally sufficient that the issues raised in the petition were presented and decided in the Court of Appeals, we note that each was fully briefed and argued.

Nor is there anything "bizarre" (Opp. 15) about our not raising here the issue of the International's responsibility. In denying the petition for rehearing the Court abandoned the *per se* rule which we had challenged on the appeal, and rested its affirmance on this issue instead on the Trial Court's instruction to the jury (App. 33a-34a, which is omitted from the string of references at Opp. 20, n. 1). Because we were in doubt as to whether objection to that instruction had been properly preserved, we restricted our petition in this Court to those serious errors of general importance as to which no technical objection could possibly be raised.

³ The reference here is apparently to the "established principles" enunciated at Opp. 16-19 dealing with the scope of § 8 (b)(4)(B). The Court of Appeals' opinion does not discuss this subject at all.

What is not clear is whether by "established principles" respondent refers to the statements of law in the five cases which it quotes, and which we accept, or respondent's own statement of the law as it applies to this case (Opp. 17), which is plainly wrong. What respondent is pleased to call "the 'hot cargo' letters sent by the Union to Great Coastal's customers" (described at Pet. 4), were clearly lawful under this Court's decisions cited at Pet. 27, n. 14, and a decision by the National Labor Relations Board with respect to an almost identical letter sent out by the same local union, *Estes Express Lines*, 181 NLRB 790. The Board there held also that such a letter "by assuring the neutral employers that any such picketing would meet Moore

which, according to respondent (Opp. 1-2), the decision below involves. We therefore turn to respondent's argument with respect to the individual questions.

Dry Dock standards, and by disclaiming any intention to threaten the neutral, negates any unlawful secondary objective" (*Id.* at 791).

The proposition that ambulatory picketing is not necessarily lawful even if it complies with *Moore Dry Dock* standards (Opp. 17) if sound, avails respondent nothing; contrary to its assertions, we raise no *Moore Dry Dock* issue in this Court. What matters is that ambulatory picketing is not *per se* illegal, as respondent implicitly concedes. Its illegality turns on its objective, that is, whether it is to induce the secondary employees not to aid the primary employer in its day-to-day operations, here by refusing to load or unload Great Coastal's freight (legal), or to engage in a more general work stoppage (illegal). *Steelworkers v. Labor Board*, 376 U.S. 492, 499; *Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 386-390; *NLRB v. Operating Engineers*, 400 U.S. 297, 304.

⁴ The reference here appears to be to the assertion at Opp. 2 which we quote and refute at pp. 6-7 *infra*. Throughout its brief respondent describes other facts or evidence as "undisputed". But given the rule of *Carrier*, and respondent's assertion that all its damages flowed from ambulatory picketing, the only material factual issue is whether it is *undisputed* that the defendants induced secondary employees to "respect" the picket lines by engaging in general work stoppages in their presence or only refrain from loading or unloading Great Coastal freight. Respondent quotes, out of context, a statement by Hodson given at the first trial: "If they respected the picket line they wouldn't be working (426)" (Opp. 12). This omits the colloquy immediately thereafter, where plaintiff's counsel clarifies the matter:

"Q. Wouldn't be loading and unloading Great Coastal trucks?
A. No, sir." (I JA 426-427)

We reproduce in Appendix A, *infra*, Hodson's testimony on this subject at the second trial in which the limited scope of the inducement is clear beyond capacity to pervert. Plaintiff's counsel himself there said:

"If the employees, union members, who were working for Great Coastal's customers, cooperated they wouldn't load or unload, isn't that right? We have already established it once." (II JA 890)

ARGUMENT

Reply with Respect to Question I(a):

We agree that the District Judge determined only that the jury had been prejudiced in its consideration of damages, as shown by the excessive verdict. But from this determination, it followed as a matter of law, under the decisions of this Court and the other authorities cited as Pet. 19-20, that defendant was entitled to a new trial on all issues. Respondent surmises that the trial judge believed that the verdict on liability was not similarly infected. But *Gasoline Products* and the lower court cases applying that precedent establish that a partial new trial is not permissible unless there is no doubt that the jury's verdict on one issue is uninfluenced by its errors with respect to other issues. (Pet. 21-22, cf. Pet. 32) Surely, it is "a rational explanation for"⁵ the action of a jury which, because of improper evidence of violence, renders an award 50% greater than the plaintiff's demand or the evidence will tolerate, that it was likewise improperly influenced in deciding that the defendant was liable, the essential pre-

⁵ The phrase is that of the Fifth Circuit in an opinion of April 15, 1976, on denial of rehearing in *Jamison Co., Inc. v. Westvaco Corp.*, cited at Pet. 32 and quoted id. at n. 18. The Court said:

"We cannot be certain that this account accurately represents the jury's intention in responding as it did. In order to require retrial as to all issues, however, we need only conclude that the above presents a rational explanation for the jury's action." (Fifth Circuit slip ops. 2896, 2898).

Immediately thereafter the *Jamison* opinion quoted with approval the first two sentences of the passage of the District of Columbia Circuit's opinion in *Camalier and Buckley, etc.*, quoted at Pet. 21, n. 10.

condition for its rendering of the excessive verdict. Indeed, we think the contrary assumption is a psychological absurdity which the law should not, and under our understanding of the decisions may not, indulge.

Respondent endorses the Court of Appeals' explanation of the jury's conduct, and says that its "view of the matter coincided with that of the Trial Court" (Pet. 22). Respondent points to nothing in the record to substantiate that assessment, in fact, the judge said nothing on the subject except what is at Pet. App. 6a-7a, which is quoted at Pet. 8-9.

All else failing, respondent contends that the trial court's ruling was correct because "the plaintiff would appear to have been entitled to a directed verdict on the liability issue." (Opp. 22). The Court of Appeals' evaluation of the state of the evidence is far different:

"We should say here, and we emphasize, that the union does not contest the fact that there was evidence from which a jury could find an illegal secondard boycott. Indeed, the matter is admitted to be clearly a jury question. And the matter having been decided in favor of the plaintiff under proper instructions, it is, in all events, removed from our consideration. *Lavender v. Kurn*, 327 U.S. 645 (1946)." (App. 19a)

Additionally, that Court's ruling on rehearing International's responsibility establishes that this liability issue, too, was a jury question. Defendant was entitled to have these liability issues decided by a fair-minded jury, rather than one which rendered an admittedly excessive verdict in the teeth of the Court's instructions. Since the courts below denied defendant that fundamental right, it can be vindicated, and adherence to this Court's precedents enforced, only by the exercise of this Court's reviewing authority.

Reply with Respect to Question 1(b):

Respondent says:

“Of course, it is readily apparent that once again the *entire* argument is necessarily predicated upon the all-important assumption that some of the plaintiff’s damages were incurred as a result of lawful strike activity, and some by admittedly unlawful secondary boycotting, and that *no* recovery could properly be had unless the plaintiff met its burden of proving what portions of its damages were proximately caused by particular acts of the Union shown to be violative of § 8(b)(4) of the Act.” (Opp. 23, emphasis in original)

We accept the foregoing, with a single exception which we mention in the margin.⁶ Great Coastal’s principal response is to assert it to be an “unassailable fact that *all* of the plaintiff’s damages were the direct and proximate result of the Union’s illegal secondary boycotting, and none was caused by permissible or protected strike activity” (Opp. 23-24). We unqualifiedly dispute the assertion that this is a “fact”.

This claim first appears at Opp. 2:

“The Union never appealed from the adverse decision rendered in the Trial Court which held, upon the uncontested evidence, that all of the damages sustained by this Respondent resulted directly and proximately from widespread, persistent, and successful secondary boycotting activities with which the Union supported its strike.”

⁶ Our objection is to the phrase “were incurred”. A more accurate statement of our position is that it depends on the assumption that some of the plaintiff’s damages *could have been* incurred as a result of lawful strike activity. See Pet. 26-27, 29-31. That assumption is correct as a matter of law, see Pet. 27 and pp. 2-3, n.3, *supra*.

The trial court did not so hold, and respondent points to nothing in its opinion or elsewhere in the record to justify that statement. On the contrary, the District Court submitted the issue of proximate cause to the jury at the second trial, although under circumstances which made it impossible for the jury to perform that function. And even respondent does not argue that the Court of Appeals so held.

The assertion is repeated in the Statement of the Case. (Opp. 5, 14). At Opp. 5 respondent refers to various excerpts from the testimony of Great Coastal’s president Estes at the second trial. For the sake of completeness we describe this testimony item by item in App. B, *infra*. The essential points, however, are 1) that Estes nowhere connects any strike activity with any loss; and 2) that Estes expressed the opinion that all his losses were caused by “secondary boycotting activities” (II JA 720), which he did not further identify. His expression of opinion, which was objected to, was not competent and the Court instructed the jury to disregard it (II JA 916). See Pet. 30, n. 15, second paragraph.

The representation that all changes flowed from “ambulatory picketing” (Opp. 5) is belied by Great Coastal’s answer to interrogatories, quoted in Appendix C, *infra*, p. 6a.

Description of respondent’s references at Opp. 14 is unnecessarily complicated because it has combined in a single parenthesis references to evidence on two separate subjects” boycott directives of Union officials and the uncontested evidence that all Company damages flowed directly from secondary boycotting and that none resulted from primary picketing” (*id.*). Nevertheless,

in App. C, *infra*, we describe that evidence. It suffices to say that there is nothing which connects any, much less all, of plaintiff's losses to any activity, legal or illegal.

In sum, the "unassailable fact" (Opp. 23) is not a fact at all.

In response to Question 1(b) Great Coastal tenders two additional points. The first is that all the liability evidence was also presented to the damage jury, which therefore "did have complete knowledge of the evidence upon which the first jury found liability" (Opp. 24). The short answer is that the damage jury did not have knowledge of what incident or incidents the first jury based its liability finding. A somewhat longer and likewise conclusive answer is that there was nothing that the damage jury could usefully do with that evidence, or the knowledge that it had been before the first jury. The damage jury could not determine for itself which, if any of the strike activities were illegal, for it was not instructed to do so, nor given any basis for separating licit from the illicit. It was instructed only that it was to accept as given the union's liability for action with "certain" of Great Coastal's customers. (Pet. 10, 29-30). Nor, if it had been instructed to assess that evidence independently—that is, if it had been directed to redetermine liability—could the jury have taken the necessary next step under *Morton*, to determine which acts proximately caused loss to the plaintiff, for plaintiff steadfastly refused to introduce any evidence linking particular actions to its losses. See also Pet. 30-31.

Respondent also emphasizes the Court of Appeals' approval of the trial court's instructions. (Opp. 24) On this point we rest on the discussion at Pet. 30, n. 15.

Reply with Report to Question 2:

First, respondent seeks to distinguish *Teamsters Union v. Morton*, 377 U.S. 252, on the ground that that case was tried to the Court, whose decision, according to respondent, in effect constituted a special verdict; whereas the present case was tried to a jury and no special verdict was sought. We are quite at a loss to understand what this difference in procedure has to do with the holding of *Morton* that in a suit under § 303 the plaintiff may only recover those losses which he proves were proximately caused by a violation of § 8(b)(4), on which the decision below engrafted a devitalizing exception by a misapplication of *Story-Bigelow* (see Pet. 30-41). It is apparently Great Coastal's submission that it was relieved of the burden of proof because the defendant union did not move for a special verdict. We agree that because of the limited retrial and also because of plaintiff's strategy, to show only its total strike losses, that has been the effect of the decision below; but we emphatically dispute that this is permissible under *Morton*.

Respondent's only other argument on this point is to again observe "that in this case it was established that all of plaintiff's damages proximately resulted from conduct of the Union that violated the secondary boycott provisions of the Act" (Opp. 26). As we have felt compelled to demonstrate at perhaps excessive length, that proposition was not "established". Respondent's tireless repetition does not make it so.⁷

⁷ In a decision reported after the Petition was filed, *Fleming Building Co., Inc v. Northern Oklahoma Building & Trades Council*, 91 LRRM 2794, the Tenth Circuit has joined the Second, Fifth & Ninth (see Pet. 39-40) in holding that the plaintiff in a § 303 suit must "establish the existence of damages by a preponderance of the evidence" (*id.* at 2795).

CONCLUSION

For the reasons stated in the petition and herein, the
Petition for Certiorari should be granted.

Respectfully submitted,

SIDNEY DICKSTEIN
GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D. C. 20037
Attorneys for Petitioner

APPENDIX

APPENDIX A

Excerpt from Transcript of Second Trial Regarding the Object
of Defendants' Ambulatory Picketing [II JA 890-891]

Q. [Mr. Alexander, Plaintiff's counsel] Mr. Hodson, I want to know, the question was this, that if they were—if these employees of Great Coastal customers were respecting your picket line, they would not be loading and unloading Great Coastal freight, would they?

A. Naturally, they wouldn't.

Q. Would not?

A. Would not.

Q. And when your roving pickets went there, they went there knowing this, didn't they?

MR. DICKSTEIN: Objection. This witness doesn't know the state of mind of anyone else.

MR. ALEXANDER: All right. I will withdraw that one.

BY MR. ALEXANDER:

Q. You said to Mr. Trerotola, if the employees of Great Coastal's customers were cooperating they would stop loading Great Coastal freight, isn't that right?

A. Employers?

Q. Employees.

A. Employees.

Q. Employees.

A. If the employers were cooperating, they wouldn't.

Q. See, Mr. Hodson, I haven't said a word about employers and I am not interested in employers. I am interested in these things here.

If the employees, union members, who were working for Great Coastal's customers, cooperated they wouldn't load or unload, isn't that right? We have already established it once.

A. If they respect the picket line, they would not.

APPENDIX B

Summary of Testimony of C. E. Estes Cited at p. 5 of
Brief in Opposition

At II JA 718-721 Estes testified that there was no time during the strike that drivers would not cross the picket line at Richmond to drive Great Coastal's trucks; that the drivers did other work than driving during the strike; that Great Coastal obtained an intrastate contract hauling permit from the State; and that it would continue to pick up freight in the Virginia area. He was also permitted to testify as follows:

"Q. Do you know of any reason for any change in your operations during the strike other than the secondary boycotting activity?

MR. DICKSTEIN: Objection.

THE COURT: Overruled.

THE WITNESS No, sir. We could have operated, handled every customer we had and were doing it." (II JA 720)*

At II JA 731 Estes testified that during the strike he had freight which he could not deliver but had to bring back. At II JA 732 the Court overruled defendant's objection that the testimony had not been connected with secondary boycott activity. No such connection was subsequently made.

At II JA 740 Estes testified that Great Coastal was handling local cartage in Richmond during the strike and that local cartage was also being handled in New Jersey.

At II JA 743-744 Estes testified that the reason that there were only two north-bound shipments in October 1970 during the strike was that Great Coastal had to restrict the number of stops on a trailer because the drivers were

* The jury was instructed to disregard this testimony. II JA 916.

"trying to shake these pickets so they * * * wouldn't shut off the delivery when we went to our customers". He also stated: "If we had been picketed legally, we could have hauled all the freight we were handling before." He also said: "We had cartage agents up there willing to deliver any freight we brought to them if we could keep the illegal picketing away" and that "[t]here was no reason to take freight that was going to sit on our lot and illegal picketing could keep us from delivering it." (*Id.*)

At II JA 763-764 Estes testified: "We picked up all the calls that we could pick up that the pickets would not—weren't harassing us and allowing them to load it." II JA 763. He denied that he was seeking to recover damages for all the business lost during the strike but only those "that were inflicted by the illegal strike" (*id.*). He opined further that "[o]ur business was destroyed by violence and illegal picketing." (II JA 763-764).

At II JA 777-778 Estes stated that because of the picketing, Great Coastal lost the business of Rochester Button which went to a competitor and did not return to Great Coastal after the strike (II JA 777). He also stated that the pickets followed Great Coastal's trucks wherever they went (II JA 778).

At II JA 789-790 Estes testified to Great Coastal's savings because it was not necessary to use the Jersey City terminal as he had been required under the prior Union agreement. He also testified that it was his belief that his customers were "coerced into not doing business" with Great Coastal (II JA 789-790). However, when Estes attempted to explain what he meant by "coerced" the Court sustained an objection to such explanation on the ground that the testimony was not based on Estes' personal knowledge. (II JA 790-791).

Estes' testimony at II JA 810-813 involves situations where Great Coastal first attempted unsuccessfully to make

deliveries, brought the cargo back, and ultimately affected delivery. Estes stated that he did not keep a record of these incidents because "[n]obody asked for it, so why go to the cost and expense?" (II JA 810). He denied the reshipments and stated that "they would be reflected in our operating ratio". He was unable to identify a specific incident in which this occurred, even with the single company that he named (Chesapeake) because there were "so many of them" (II JA 811-813).

APPENDIX C

Summary of Testimony and Exhibits Referred to at Opp. 14

For convenience we reproduce respondent's assertion:

"With that exception, as the Joint Appendix shows, all liability and damage evidence was readmitted and presented to the jury at the second trial—including the boycott directives of Union officials and the uncontested evidence that all Company damages flowed directly from secondary boycotting and that none resulted from primary picketing (868, 876, B. 226, B. 271, B. 275)." (Opp. 14)

Of these references there is testimony only at 876; it refers to "the boycott directives of union officials".

At 868 plaintiff introduced eight exhibits, and its own answers to certain interrogatories. Those exhibits which fit either of the categories, relate only to the "boycott directives". The answers to the interrogatories are identical, each drawing attention to an attached report of the accountants Ross, Lybrand and Montgomery; Those accounting records, of course, show nothing about the *cause* of the losses which they reflect.

B. 271 is reproduced at 868; this reference is therefore duplicative. At B. 226 respondent introduced Exhibit Nos. 104a, 104b, 110 and 111. The 104 Exhibits are working papers of Mr. Lepp, plaintiff's accounting witness who acknowledged that he did not know the cause of any losses (II JA 846, 847, quoted as Pet. 9). Exhibits 110-111 were charts showing Great Coastal's net profit and loss; they do not show whether any losses were caused by legal or illegal activity.

At B. 75 respondent introduced Exhibits 108, 109, 112 and 113. Exhibits 108 and 109 were plaintiff's answers to interrogatories. We do not know to which of its answers respondent invites the Court's attention, but none v

evidence that all damages (or any) flowed from secondary boycotting. Indeed, in answer to Interrogatory 13(d) respondent said in part:

“In most cases, customers reacted to union letters, oral appeals and roving pickets by ceasing to ship or receive freight from the plaintiff, but without expressly notifying the plaintiff that they were ceasing to do business with it.”

Exhibits 112 and 113 are the tonnage and revenue reports for 1970 and 1971 respectively. These show a causal relationship between the strike and plaintiff's loss of revenue, but not between illegal strike activities and that loss, as respondent alleges.